IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION
and
WYMAN-GORDON COMPANY,
Appellants

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
Appellee

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42, for leave to file a brief *amicus curiae* in support of Appellants. This motion is necessitated by the

refusal of the Appellee to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae,* the Chamber of Commerce of the United States of America, is set forth in detail in its brief. To summarize, the Chamber of Commerce is the largest business federation in the United States, representing both large and small business organizations, as well as businessmen and women, throughout the United States, including the Commonwealth of Massachusetts.

The determination of the Supreme Judicial Court of Massachusetts that corporations possess, at best, limited First Amendment rights, if permitted to stand, will affect corporations throughout the country. The interest of the Chamber of Commerce and its members is rooted in the potential impact of this case as a precedent which will affect their ability to communicate on issues of vital concern to the Nation, their respective States and localities.

This case raises the fundamental issue of the right of business organizations and their employees to express their views on issues of importance to them. The decision below also intimately involves the right of the public to receive a multitude of views, including those of corporations and business persons, on public issues.

As *amicus curiae* the Chamber of Commerce is in a unique position to articulate the views of the business community on these matters of fundamental concern. Because the case is national in its ramifications, we respectfully submit that the views of a national organization, the Chamber of Commerce, are appropriate for consideration by this Court.

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[1] Appellants have consented, pursuant to Supreme Court Rule 42.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of Appellants be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America [hereafter the Chamber] is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber is the largest business federation in the United States, with a total membership in excess of 65,000 enterprises and organizations representing businessmen and women throughout the United States, including the Commonwealth of Massachusetts. More than 3700 state and local chambers of commerce and trade associations are members. Direct business memberships number in excess of 62,000, the overwhelming majority of which are corporations.

The interest of the Chamber and its members is rooted in the potential impact of this case as a precedent which will determine their ability to speak freely on issues of vital concern to the Nation, their respective States and localities. The Board of Directors of the Chamber have long recognized that business leaders have the obligation, *inter alia:*

> To guard against unjustifiable restraint, direct or indirect, upon the free and frank expression of opinion on public issues by business and businessmen.
>
> To recognize social as well as economic obligations and to accept the assumption of leadership in meeting the problems and needs of the community.
>
> POLICY DECLARATIONS *Adopted by the Chamber of Commerce of the United States of America,* (October 1975 ed.) at 12.

Thus, the Chamber and its members are involved in a wide range of activities, such as delivering speeches, publishing pamphlets and books, and conducting seminars, which directly involve the discussion of government affairs. To the extent that this case questions

the right of corporations to be heard on public issues, it goes to the heart of both the Chamber's own operations and those of its members.

The determination of the Supreme Judicial Court of Massachusetts that corporations possess, at best, limited First Amendment rights, if permitted to stand, will serve as a precedent to prohibit corporate free speech throughout the country. Thus, this case squarely presents to the Court the issue of the First Amendment rights of corporations to speak out on issues of public concern to the community in which they are located.

This case directly involves the right of corporations "to expend monies to publicize by paid advertisements in newspapers and other media, their contentions with respect to the graduated income tax and the proposed Constitutional Amendment in an attempt to persuade the voters of Massachusetts to defeat the proposed Constitutional Amendment at the general election." (App. F at 28). At issue is also the right of corporate employees to speak out on matters of public concern, at corporate expense. *Ibid.* And ultimately, this case involves the right of individuals to receive communications which set forth a particular point of view on a matter which requires the citizens of the Commonwealth of Massachusetts to amend their Constitution.

Mass. Gen. Laws ch. 55, § 8 operates to limit the subject matter of corporate speech and thus imposes an absolute bar upon free and unfettered speech:

> . . . no business corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any ques-

> tion submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Thus, in an area where "[t]here is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations" (App. F at 33), Massachusetts would bar discussion of the issue by a business corporation, but not by any other person, group or organization which desires to speak out on this matter.

The Chamber, as *amicus curiae,* takes no position on the issue of whether a graduated income tax proposal should be adopted in the Commonwealth of Massachusetts. Rather, the Chamber's interest is that all points of view, including those of incorporated enterprises, be presented to the public on this important matter—so that, ultimately, the free, frank, and robust expression of public opinion on issues may be expressed by business organizations, businessmen and businesswomen, as guaranteed by the First Amendment.

ARGUMENT

Over half a century ago, Mr. Justice Holmes conceded that the United States would not come to an end if the Supreme Court lost its power to declare an Act of Congress void. But he cautioned: "The Union would be imperiled if [the Court] could not make that declaration as to the laws of the several States." Holmes, *Law in the Court*, collected in Speeches by

Oliver Wendell Holmes 98, 102 (1913). Few cases in recent memory have so dramatized the wisdom of this observation as does the case at bar.

In its decision below, the Supreme Judicial Court of Massachusetts upheld the constitutionality of chapter 55, section 8 of the Massachusetts General Laws.[1] In essence, that statute makes it a criminal offense for a business corporation to expend any monies to promulgate its views on any question—no matter how urgent or how important the question may be to the public weal—if that question is pending before the Massachusetts electorate, unless the question "materially affect[s] the property or assets of the corporation."[2]

To fully appreciate the profound threat to cherished First Amendment liberties posed by the opinion below, it is necessary to consider the purposes subserved by the First Amendment and the role that the Amendment plays in our scheme of government.

To the Founders of our Republic, repression of thought and speech were vivid and portentious evils. Indeed, history bore witness to the awful truth that

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[1] Massachusetts General Law, ch. 55, § 8 provides, in pertinent part, that: ". . . no business corporation . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of . . . influencing or affecting the vote on any qu stion submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transaction of individuals shall be deemed materially to affect the property, business, or assets of the corporation."

[2] The decision below is contrary to *C. & C. Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (D. Mt. 1976) and *Pacific Gas and Electric Co.* v. *Berkeley*, 131 Cal. Rptr. 350 (1976).

those societies which found it expedient to stifle criticism and persecute the expression of opinion had suffered first, ennui, and then total decay.[3]

Sensitive to the disquieting reminders of history, the Founders fashioned the First Amendment primarily to ensure the unfettered interchange of ideas for the bringing about of political and social changes.[4]

Indeed, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should

[3] C. H. Lansky, The Grammar of Politics 120-121 (3rd ed. 1934).

[4] *See generally, Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-763 (1972); *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271-72 (1971); *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 611 (1970); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969); *Watts* v. *United States*, 394 U.S. 705, 708 (1969); *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Rosenblatt* v. *Baer*, 383 U.S. 75, 85-86 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-238 (1963); *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940). *See also* Meikeljohn, Political Freedom: The Constitutional Powers of the People 75 (1960). Of course, the First Amendment "does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress are not solely religious or political ones. And the rights of free speech . . . are not confined to any field of human interest.'" *United Mineworkers* v. *Illinois State Bar Association*, 389 U.S. 217, 223 (1967).

be operated, and all such matters relating to political processes." *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966).

Such an expansive interpretation of the First Amendment is mandated by the very nature of our constitutional democracy which presupposes and requires the active participation of an enlightened and informed electorate.[5] Thus, "a broad conception of the First Amendment is necessary to supply the *public need* for information and education with respect to the significant issues of the times. [footnote omitted] . . . Freedom of discussion, if it would fulfill its historic function in this Nation, *must embrace all issues* about which information is needed or appropriate *to enable the members of society to cope with the exigencies of their period.*'" *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962) (emphasis supplied). *See also, Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976).

Apart from indiscriminately trenching upon the acknowledged First Amendment rights of corporations,[6] the essential vice of section 8's virtually all-encompassing prohibition on corporate speech is that it

[5] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring). *Cf., Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). ("Public discussion is a political duty.")

[6] *See also, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United States* v. *CIO*, 335 U.S. 106, 154-155 (1948) (Rutledge, J., concurring); *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 244 (1936); *Schwartz* v. *Romnes*, 495 F.2d 844, 852 (2d Cir. 1974); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U.CHI. L. REV. 148, 151-52 (1974); 122 Cong. Rec. 3677-78 (remarks by Sen. Cannon) (March 17, 1976).

deprives the electorate of a vital source of information precisely at a time when such information is most needed if the electorate is to make reasoned and rational judgments. *Cf., Mills* v. *Alabama,* 384 U.S. 214 (1966).[7]

The Attorney General of Massachusetts surely cannot be heard to argue that section 8's prohibition on corporate speech has no more than a *de minimus* effect on the dissemination of vital information to our people. Indeed, such an argument is manifestly unacceptable in light of the dominant role corporations play in the functioning of our Nation.

Of relatively recent growth, the corporation has become almost the unit of organization of our economic life. "Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present

[7] Corporations, like individuals, are not homogeneous. Some corporations are multinational enterprises, the stock of which is publicly held and traded while others are medium-sized public companies; many are closed, closely held corporations controlled by an individual or family. The categorical prohibition upon corporate speech of the type imposed by the statute in question here best serves to limit the speech not only of the corporate official who speaks on behalf of the corporate entity, but also of the small businessman who, for personal reasons, has chosen to incorporate. The use by such individuals of corporate funds—which in a very real sense are their only assets—to express an opinion on a matter of public concern is also prohibited by the statute at issue. In short, the prohibition embodied in Section 8 applies with equal force to the incorporated corner drugstore as it does to a financial institution or major manufacturing facility. The statute is drafted as though all corporations were industrial giants.

substitute for it except the state itself." *Tax Commission* v. *Aldrich,* 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).[8] Thus, the prohibition upon certain forms of corporate speech upheld by the court below threatens to have a substantial nationwide impact.

Apace with the burgeoning growth of corporations has come the heightened recognition that corporations have responsibilities to the society in which they function and from which they draw their sustenance. *See, D. Linowes,* "The Corporate Social Audit," in Social Responsibility and Accountability 93 (1975); C. Madden, Clash of Culture: Management in an Age of Changing Values 74 (1972); K. Davis and R. Blomstrom, Business, Society and Environment: Social Power and Social Response 413 (3rd ed. 1975). In order that corporations can effectively carry out these responsibilities, they must be able to communicate with the citizenry at large:

> Freedom of the press and other mass communications is not an end in itself but it is a means to an end of a free society. Obviously, mass communication is not set up simply for the profit of business. Business's social role is to provide the people a valuable service which helps maintain their freedoms. Davis and Blomstrom, *supra* at 413.

The statute at issue prevents the modern corporation from fulfilling a major social obligation to the

[8] The IRS estimates that in 1975, 588,133 small business corporations filed tax returns. Internal Revenue Service Preliminary Report, Statistics of Income—1975 Individual Tax Returns 19, Pub. No. 198 (2-77) (1977). Other statistical surveys estimate the total number of corporations in the United States as of 1973 at 1,905,000. Statistical Abstract of the United States 507 (9th ed. 1976).

public by cutting off an important avenue of communication: It forbids corporations from speaking out on all ballot issues save those directly and materially affecting the assets or property of the corporation. Additionally, by prohibiting corporate speech, section 8 will often deprive the electorate of one of the most knowledgeable and uniquely qualified sources of information. *See, Pacific Gas & Electric Co.* v. *Berkeley,* 131 Cal. Rptr. 350, 353 (1976). *Compare, Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242, 258 (7th Cir. 1975).

An apparent justification for section 8's sweeping prohibition of corporate speech is the notion that such a prohibition is necessary to insure that corporations do not have a disproportionate voice on ballot issues, thereby over-awing the voters. Section 8's paternalistic prohibition of corporate speech demeans the very foundations on which our society rests. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth." *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962), citing *Thornhill* v. *Alabama,* 310 U.S. 88, 95 (1940).

Only last term this Court held that "democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate . . . issues." *Buckley* v. *Valeo,* 424 U.S. 1, 49 (1976). Indeed, the "most complete exercise ot [First Amendment] rights is essential to the full, fair and untrammelled operation of the electoral process." *United States* v. *CIO,* 335 U.S. 106, 144 (1948) (Rutledge, J. concurring). In sum, the evil sought to be remedied by section 8 (i.e., the promulgation of ideas) is "precisely one of the types of activity envisioned by the Founders

in presenting the First Amendment for ratification." *Wood* v. *Georgia, supra.*[9]

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted,

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[9] A second justification for the statute in question was found by the Court below to be a legislative desire to protect shareholders of business corporations against *ultra-vires* activities and unnecessary expenditures. (App. A at 22). For the reasons so cogently set forth in the Appellants' Jurisdictional Statement, this is not a sufficiently compelling reason to justify section 8's broad interference with free speech.